UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BARBARA VOISINE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-340-P-DMC***
	)	
RICHARD J. DANZIG,	***)***	
Secretary, Department of the Navy,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON MOTIONS IN LIMINE

The plaintiff has filed two motions *in limine* and the defendant one motion *in limine* with several subparts. The defendant does not object to the plaintiff's Second Motion in Limine (Docket No. 35), to preclude the defendant from offering evidence in the presence of the jury relating to the plaintiff's receipt of worker's compensation benefits, Defendant's Response to Plaintiff's Motions in Limine (Docket No. 40) at 8, and that motion is hereby granted. For the reasons set forth below, the plaintiff's First Motion in Limine (Docket No. 34) is denied and the defendant's Motion in Limine or Motion to Exclude Testimony ("Defendant's Motion") (Docket No. 36) is granted in part. I will reserve ruling on two parts of the defendant's motion until trial, and conclude that another part is moot.

I. The Plaintiff's Motion

In her first motion *in limine*, the plaintiff seeks to bar the defendant from contesting her claim

that her psychological injuries were caused by the episodes of alleged sexual harassment at work that are the subject of this action, based on the outcome of the plaintiff's claims for worker's compensation benefits arising out of the same events. Plaintiff's First Motion in Limine at 1. She essentially argues that, because she was required to establish that the medical condition for which she was awarded benefits was "causally related to the claimed injury," 20 C.F.R. § 10.115(e), the element of causation on her Title VII claim must be taken as established by operation of the doctrine of judicial estoppel.[1] Plaintiff's First Motion in Limine at 4. In the alternative, she argues that it would be unfairly prejudicial to allow the defendant to introduce evidence of any other possible cause of the stress, depression and adjustment disorder from which she suffered at the relevant time. *Id*. at 4-5. Neither of these arguments is persuasive.

As set forth in the case law cited by the plaintiff, judicial estoppel "precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another." *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 12 (1st Cir. 1999), *quoting Patriot Cinemas, Inc. v. General Cinema Corp*., 834 F.2d 208, 212 (1st Cir. 1987). The First Circuit's application of the doctrine "requires that the party being estopped have succeeded previously with a position directly inconsistent with the one it currently espouses." *Id*. at 13. Administrative proceedings are considered prior legal proceedings for purposes of the doctrine, *Roy v. Runyon,* 954 F. Supp. 368, 375 (D. Me. 1997), but there are other considerations to be addressed before this court "may take the extraordinary step of rejecting a litigant's entire argument without any consideration of its merits," *UNUM Corp. v. United States,* 886 F. Supp. 150, 158 (D. Me. 1995).

[1] The plaintiff does not specify the doctrinal basis for her estoppel argument, but the case law that she cites deals only with claims of judicial estoppel.

> To apply the doctrine, a court must determine that the necessary elements are present. A litigant, as an initial matter, must, in effect, have made a bargain with the tribunal of the first proceeding by making certain representations to the tribunal in order to obtain a particular benefit from the tribunal. Additionally, the position taken in the second litigation must be inconsistent with one successfully and unequivocally asserted by that same party in a prior proceeding regarding a matter material to the outcome of the prior proceeding. Finally, the First Circuit has implied . . . that, in the absence of deliberate dishonesty or any serious prejudice to judicial proceedings or the position of the opposing party, the doctrine should not be applied.

Id. (internal punctuation and citations omitted).

Here, the plaintiff begins by misinterpreting the language of the regulation upon which she relies. That regulation requires an employee, in order to obtain workers' compensation benefits under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.*, to show that the medical condition for which she seeks compensation is causally related to her claimed injury, not that the injury was caused by the employer. The plaintiff's claimed injury in this case was psychological damage, not the substance on the toilet seat or the poster or her employer's actions when made aware of these incidents. In order to obtain FECA benefits, she was required to show that the medical treatment for which she sought payment was causally related to that psychological damage — stress, depression, or adjustment disorder — and not that her employer caused the stress, depression, or adjustment disorder. Indeed, FECA benefits are available for employment-related injuries "without proof of fault." *Wallace v. United States*, 669 F.2d 947, 951 n.3 (4th Cir. 1982). Accordingly, any findings by the Department of Labor concerning the plaintiff's entitlement to FECA benefits for this injury cannot be interpreted as a finding concerning the causation of that injury by the defendant or anyone else.

In addition, the defendant was not allowed to assert a position in the FECA proceeding. The

governing regulations make clear that, with one exception not shown by the plaintiff to be relevant in her case, "[t]he employer does not have the right . . . to actively participate in the claims adjudication process." 20 C.F.R. § 10.118(c). A party that cannot participate actively in the prior proceeding cannot have made a bargain with that tribunal. Further, the plaintiff has made no showing that the defendant took the position in the FECA proceeding that it had caused her claimed injury, and the defendant certainly did not obtain any "particular" benefit from that proceeding.

Finally, "[t]he program FECA establishes is similar in structure and policy to state workers' compensation programs." *Gill v. United States*, 641 F.2d 195, 197 (5th Cir. 1981). Preclusive effect is not to be granted to the findings made in state workers' compensation proceedings for purposes of federal Title VII claims. *See Kunferman v. Ford Motor Co.*, 112 F.3d 962, 966 (8th Cir. 1997). No reason is apparent to me, and none is offered by the plaintiff, why findings made in a federal workers' compensation proceeding should be treated differently. *See generally Miller v. Bolger*, 802 F.2d 660, 664-66 (3d Cir. 1986) (discussing different purposes of, and relief available under, FECA and Title VII).

The plaintiff's cursory argument concerning the unfair prejudice that would result from the admission of evidence of any possible cause of her emotional distress other than the alleged sexual harassment deserves no extended discussion. Any evidence of a potential source other than that upon which the plaintiff bases her claim would obviously be prejudicial to her; Fed. R. Evid. 403, however, only bars evidence that would be unfairly prejudicial. *Iacobucci v. Boulter,* ___ F.3d ___, 1999 WL 773526 (1st Cir. Oct. 4, 1999), at *5. "In Rule 403, 'prejudice' does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate

means." 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5215 at 274-75 (1978). Here, the plaintiff has made no showing that such evidence would stimulate excessive emotion or awaken a fixed prejudice to the extent that a rational determination of the truth would be prevented, *id*. at 278, or that such evidence is likely to suggest an impermissible major premise, *id*. Supp. 1999 at 241. The defendant may not be barred from presenting evidence of other possible causes of the plaintiff's alleged injury on this basis.

The plaintiff's first motion *in limine* is denied.

II. The Defendant's Motion

The defendant's motion *in limine* has four parts: (i) it seeks to bar certain evidence, both documentary and possibly testimonial, from Dr. Hanley, a treating professional, and Drs. Thaler and Voss, professionals who reviewed the plaintiff's claim; (ii) it seeks to exclude or limit the testimony of Annette Studebaker; (iii) it seeks to exclude testimony from the plaintiff about "crank calls" that she received at home beginning in September 1992; and (iv) it seeks to exclude evidence concerning the defendant's termination of the plaintiff's employment in 1996.

A. Expert Testimony

The defendant asks the court to exclude the following prospective testimony, or "similar testimony," of three witnesses designated by the plaintiff as experts. Defendant's Motion at 1-4. The plaintiff has represented that Constance Hanley, Ph.D., a licensed psychologist, will testify to the opinions set forth in three letters attached to her designation of expert witnesses, a copy of which is attached to the defendant's motion. The defendant objects to Dr. Hanley's statements in those letters concluding that the plaintiff was in fact subjected to sexual harassment while employed by

the defendant. *Id*. at 2. The plaintiff has represented that Frederick K. Thaler, M.D., a family practice physician, will testify to his opinions set forth in several letters and notes attached to her expert witness designation, copies of which are also attached to the defendant's motion. The defendant objects to Dr. Thaler's statements in those documents concluding that the plaintiff was in fact subject to sexual harassment at her work place, *id*. at 2-3, as well as to statements made by Dr. Thaler at his deposition to the effect that complaints of sexual harassment by the plaintiff and other women "are not really taken to heart," that the plaintiff's complaint "happens to be the most extreme of the ones that I hear about," and that "[a]s a medical opinion," Dr. Thaler "would encourage people to get as much support as possible before they have to address issues such as this at the Navy," *id*. at 3. Finally, the plaintiff has represented that Carlyle B. Voss, M.D., a psychiatrist, will testify to his opinions as set forth in a report dated May 18, 1998, a copy of which is attached to the defendant's motion. The defendant objects to Dr. Voss's conclusions expressed during his deposition that the plaintiff's reaction to finding the pear in the toilet was reasonable, that he himself would have been disturbed by "that kind of bizarre stuff going on over a period of time," that one of the incidents reported by the plaintiff but not the subject of this action was a threat, and that the incidents reported to him by the plaintiff would make "any of us" "start[] to look over [his] shoulder when [he] left the building" and would scare people. *Id*. at 3.

The defendant characterizes this testimony as the personal views of the expert witnesses as to causation. *Id*. at 6. He contends that the witnesses are not qualified to testify concerning the existence of sexual harassment in the plaintiff's shop at the shipyard, that these opinions are unsubstantiated, that the opinions improperly invade the province of the jury, and that the probative value of this testimony on the ultimate issue, if any, is substantially outweighed by its unfair

prejudice and misleading character. *Id*. at 6-7. The plaintiff responds, without citation to authority, that "the government itself solicited the opinions of Doctors Hanley and Thaler regarding the conditions under which plaintiff could return to work," thereby making their opinions relevant and admissible "with the appropriate foundation;" that the defendant will be able to cross-examine the witnesses; that "the Court will instruct the jury what weight is to be given opinions regarding the ultimate issues;" and that Dr. Voss's opinion about the reasonableness of her reaction to the incidents "is relevant to the issue of whether the environment was sufficiently altered to invoke Title VII." Plaintiff's Objection to Defendant's Motion in Limine, etc. ("Plaintiff's Objection") (Docket No. 39) at 1-2.

Fed. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The subject of an expert's testimony must be knowledge, a word which "connotes more than subjective belief or unsupported speculation." *Daubert V. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993). The First Circuit has set forth the requirements of Rule 702 in light of *Daubert* as follows:

> Rule 702 consists of three distinct but related requirements. First, a proposed expert witness must be qualified to testify as an expert by knowledge, skill, experience, training, or education. Second, the expert's testimony must concern scientific, technical or other specialized knowledge. Finally, the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue.

United States v. Shay, 57 F.3d 126, 132 (1st Cir. 1995) (citations and internal punctuation omitted). "The fundamental question that a court must answer in determining whether a proposed expert's

testimony will assist the trier of fact is whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized knowledge of the subject matter involved." *Id*. (citation and internal punctuation omitted).

The plaintiff's objection to the defendant's motion in this case addresses only the third of these requirements. She has made no attempt to show that any of the three expert witnesses is an expert in the field of sexual harassment[2] or that reaching a conclusion that sexual harassment occurred requires specialized knowledge. That omission alone suggests that the defendant's point is well-taken. The record presented to the court does not provide any evidence that these witnesses are qualified to opine that the plaintiff was in fact subject to sexual harassment at the shipyard in 1994 and 1995.

The plaintiff's first objection, that the defendant elicited the opinions of two of the witnesses to which it now objects, is irrelevant. The plaintiff has listed these witnesses to testify on her behalf; they are not offered by the defendant. The fact that the opinions at issue, which the defendant justifiably contends it did not seek, were first offered to the defendant during an administrative proceeding, does not render them admissible or relevant when offered by the plaintiff in this judicial proceeding. If the plaintiff believes that she can nonetheless establish "the appropriate foundation" for the presentation of these opinions to the jury by these two witnesses, the time to demonstrate to

[2] Because the plaintiff has made no such showing, it is not necessary to reach the question discussed in *Lipsett v. University of Puerto Rico*, 740 F. Supp. 921, 924-25 (D.P.P. 1990), cited by the defendant, where the district court found that expert testimony concerning the existence of a hostile work environment due to discrimination based on sex "usurps the prerogative of the jury as the fact finder and would not assist the jury in understanding the evidence or determining a main issue of fact."

the court how she proposes to do that is now, in response to the motion *in limine*. She has not done so.

While it is true that an expert witness may offer an opinion on the ultimate issue in a case, Fed. R. Evid. 704(a), and that the court may instruct the jury concerning the weight to be given to such testimony, neither of these facts, nor the fact that an expert witness is subject to cross examination at trial, renders the proposed opinion testimony of that expert admissible under *Daubert* or its progeny. If the expert's qualifications to offer the opinion have not been established, if the question whether the subject matter of the proffered opinion requires the application of specialized knowledge has not been answered in the affirmative, or if the proffered testimony is nothing more than a subjective opinion or unsupported speculation, neither jury instructions nor cross examination will make the opinion admissible. The defendant's motion as to the specified opinions of Drs. Hanley and Thaler is granted.

The testimony of Dr. Voss concerning the reasonableness of the plaintiff's reaction to the incidents in her workplace that she described stands on somewhat different footing. The deposition testimony quoted by the defendant indicates that Dr. Voss believes that, as distinguished from the opinions of treating physicians, his conclusions are based on "the kind of examination" that he had done in this specific case. Defendant's Motion at 7. Also unlike the opinions of the other two experts challenged by the defendant, Dr. Voss's opinion does not assume that sexual harassment of the plaintiff actually took place. It is, instead, the kind of conclusion that Dr. Voss may well be qualified by training or experience to express. I am unable to determine, based on the information provided by the parties, whether Dr. Voss's opinion on this point meets the standard of *Daubert* and First Circuit case law. Accordingly, I will reserve ruling on this part of the defendant's motion until

Dr. Voss has been presented as a witness at trial. Resolution of this issue may require that Dr. Voss testify initially outside the presence of the jury, a point that will be addressed by counsel at the appropriate time.

B. Annette Studebaker

The defendant seeks to bar the testimony of Annette Studebaker, listed as a witness by the plaintiff, based on a letter dated June 6, 1997 that Studebaker sent to the plaintiff, a copy of which is attached to the defendant's motion. The defendant contends that there is no foundation for the "speculative statements" made by Studebaker in that letter. Defendant's Motion at 8. He also contends that the statements in the letter are not based on personal knowledge and are legally irrelevant to the extent that they refer to incidents of alleged sexual harassment other than those directed at the plaintiff. *Id*. at 8-9. The latter point appears well-taken. *See, e.g., Schrand v. Federal Pac. Elec. Co*., 851 F.2d 152, 156 (6th Cir. 1988).

However, it is not possible to tell from the fact that Studebaker is listed as a witness by the plaintiff in her Pretrial Memorandum (Docket No. 22) that she will offer testimony limited to, or even including all of, the statements in the letter. The plaintiff provides some clarification in her objection to the motion, suggesting that Studebaker will testify "regarding the adequacy of management's training about sexual harassment." Plaintiff's Objection at 2. The facts that Studebaker was laid off by the defendant before the incidents that form the basis of the plaintiff's claims occurred and that she worked in a different department from that in which the plaintiff worked do cause me concern, but I do not have sufficient information at this time to rule on the defendant's motion to bar Studebaker from testifying. Accordingly, ruling on this part of the defendant's motion is deferred until Studebaker is presented to testify at trial.

C. Telephone Calls

The defendant asks the court to bar the plaintiff from testifying about "crank and threatening calls" that she began to receive at home "[d]uring the EEO investigation," Complaint (Docket No. 1) ¶ 20, which apparently took place in 1995, *id*. ¶ 18. At her deposition, the plaintiff testified that no one spoke to her during these calls and that she did not know who was calling her but "assumed it was the shipyard." Deposition of Barbara M. Voisine, attached to Affidavit of Authenticity [of David R. Collins], submitted with Defendant's Motion for Summary Judgment (Docket No. 14), at 208.[3] The defendant contends that this testimony should be excluded because it cannot be authenticated. Defendant's Motion at 9-10. The plaintiff's objection to this part of the defendant's motion mentions, again without citation to authority, that the calls occurred "coincidentally around the time she lodged complaints of sexual harassment" and that the defendant will be able to cross-examine her about the basis of her belief that the calls were made by "the shipyard." Plaintiff's Objection at 2.

Neither the plaintiff's belief that these telephone calls were placed by someone connected with her employer nor the fact that they occurred after she complained about sexual harassment is enough, even given the fact that she can be cross-examined about the basis for her belief, to make this testimony admissible. The defendant cites case law in which testimony concerning the substance of telephone calls was excluded because the party offering the testimony could not produce any evidence to identify the person making the alleged statements during the telephone call, thus making

[3] The plaintiff's deposition testimony also suggests that these calls began some time before the EEO investigation, "around the time of the broom thing," Plaintiff's Deposition at 207, which took place in 1993, Affidavit [of Barbara Mason Voisine], pages 879-91 of attachments to Declaration of Authenticity [of Lorrie Oeser], submitted with Defendant's Motion for Summary Judgment, ¶ 41.

the telephone call unauthenticated. *United States v. Pool*, 660 F.2d 547, 560 (5th Cir. 1982); *Cook v. Babbitt*, 819 F. Supp. 1, 26 (D.D.C. 1993). That factual situation is significantly different from the one present in this case, where it is the fact of the calls and their lack of substance about which the plaintiff wishes to testify. However, the plaintiff has offered no evidence that would tend to make her conclusion regarding the source of the calls anything other than sheer speculation. Neither her subjective belief nor the timing of the calls makes it more likely than not that the calls were placed from the shipyard or by persons employed by the shipyard in connection with the three alleged incidents of harassment that are the subject of this action. *See Katz v. City Metal Co.*, 87 F.3d 26, 28 (1st Cir. 1996). Accordingly, this part of the defendant's motion is granted.

D. Termination of the Plaintiff's Employment

The plaintiff opposes the fourth part of the defendant's motion only on the ground that, should her claim based on a prohibited personnel practice survive the defendant's pending motion for summary judgment, "the court will decide the issue on a *de novo* basis, therefore evidence about plaintiff's termination would be relevant and not prohibited by Rule 403." Plaintiff's Objection at 2-3. Assuming *arguendo* that this conclusory argument is valid, a dubious proposition at best, I have granted summary judgment to the defendant on the prohibited personnel practice claim. Accordingly, the plaintiff having expressed no other objection to this part of the motion, it is granted.

III. Conclusion

For the foregoing reasons, the plaintiff's first motion *in limine* is **DENIED**; the plaintiff's second motion *in limine* is **GRANTED**; and the defendant's motion *in limine* is **GRANTED** as to the testimony of Drs. Hanley and Thaler as set forth in the motion and as to the telephone calls

received by the plaintiff. Ruling on the defendant's motion *in limine* as to the testimony of Dr. Voss and Annette Studebaker is deferred until trial. The defendant's motion *in limine* as to evidence concerning the termination of the plaintiff's employment is moot.

Dated this 26th day of October, 1999.

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David M. Cohen
United States Magistrate Judge